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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 848

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Petitioners,

—v.—

DON J. WICKHAM, Commissioner of Agriculture & Markets of the State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. CONDON
WILLIAM J. COLAVITO
WILLIAM P. WOODS
19 West 44th Street
New York, New York 10036

ARTHUR C. O'MEARA
115 West Jackson Boulevard
Chicago, Illinois 60604

EARL G. SPIKER
711 14th Street, N.W.
Washington, D. C. 20005
Counsel for Petitioner
Swift & Company, Inc.

EDMOND L. JONES
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D. C. 20006
Counsel for Petitioner
Armour and Company

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 12, 1966.

Citations to Opinions Below

The opinion of the District Court (R. 8A-31A), printed in Appendix "B" hereto, *infra*, p. 21, is reported in 230 F. Supp. 398. The opinion of the Circuit Court of Appeals (R. 157A-166A), printed in Appendix "A" hereto, *infra*, p. 11, is reported in 364 F. 2d 241.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 12, 1966 (R. 167A). An order extending the time within which to file a petition for certiorari to December 9, 1966 was signed by Mr. Justice Harlan on September 28, 1966. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Poultry Products Inspection Act and the regulations promulgated thereunder which require the advance approval of labels of poultry and poultry products by the Secretary of Agriculture have preempted the field of labeling of those products so as to render unlawful the New York statute and regulation requiring additional labeling material on the label of stuffed turkey.

2. Whether the New York statute and regulation requiring the weight of the turkey in addition to the weight of the stuffed turkey on the label of the latter product are in such direct conflict with the Poultry Products Inspection Act as to render them unlawful under Article VI, Section 2 of the United States Constitution, where the Secretary of Agriculture has rejected a label showing any other weight statement except the weight of the stuffed turkey.

Statutes Involved

The Poultry Products Inspection Act; Sections 81.1, 81.3, 81.7, 81.125, 81.127, 81.130 of 7 C. F. R.; Section 193 of the Agriculture and Markets Law of the State of New York; and Regulations 221.40 and 221.9C of the State of New York. They are set forth in Appendix "C" hereto, *infra*, pp. 43-74.

Statement of the Case

Petitioners pack frozen stuffed turkeys in Minnesota and Wisconsin. They ship the turkeys into other states for sale to retailers who resell them to consumers. These turkeys are labeled so as to show the total net weight of the poultry product, viz., stuffed turkeys, as required by the United States Department of Agriculture. Section 193 of the Agriculture and Markets Law of the State of New York and regulations issued thereunder require a separate statement of the net weight of the turkey in addition to the net weight of the whole product. Pursuant thereto, respondent, Commissioner of Agriculture & Markets of the State of New York, has taken and threatened to take action that has prevented and will continue to prevent the sale of petitioners' stuffed turkeys, unless they are labeled in compliance with New York Law.

In mid-1963 both petitioners applied to the United States Department of Agriculture for approval of a label which would satisfy the New York requirement. In accordance with its long-standing policy against multiple-weight statements on combination products, the Department of Agriculture denied these applications. Petitioners did not seek administrative or judicial review of these denials.

Petitioners brought this action in the United States District Court for the Southern District of New York seeking a declaration of their right to sell stuffed turkeys in New York under the federally approved label and an injunction against respondent's enforcing the New York labeling law. The complaint alleges that Section 193 of the New York Agriculture and Markets Law and the action taken and threatened by respondent under it violate petitioners' rights under the commerce and supremacy clauses of the United States Constitution and the due process and equal protection clauses of the 14th Amendment. At petitioners' request, the action was heard by a three-judge court pursuant to 28 U. S. C. Section 2281.

The District Court dismissed the complaint and entered judgment for respondent. The Court found no merit in petitioners' contention with respect to the commerce clause or the claims under the 14th Amendment. With respect to the supremacy clause, the Court found no congressional purpose to preempt the field so as to preclude state action with respect to the labeling of poultry products. The Court further found that there was no irreconcilable conflict between the federal act and the New York statute so as to render the latter invalid. In this connection, the Court held that petitioners could, consistent with the federal law, add a supplementary label to their products which label would not bear any indicia of federal approval. Finally, the District Court questioned whether this was properly a case for a three-judge court, but left the issue open suggesting that petitioners prosecute simultaneous appeals to the Supreme Court and to the Court of Appeals for the Second Circuit. Both appeals were filed and the matter was held in abeyance in the Court of Appeals pending deter-

mination of this issue in this Court. On November 22, 1965 the Supreme Court handed down its decision in which it held that this matter was not properly a three-judge court case and, accordingly, the Supreme Court had no jurisdiction to hear the appeal. In reaching this conclusion, the Supreme Court held further that petitioners' claims with respect to the commerce clause, Article I, Section 8, Clause 3, and the 14th Amendment of the United States Constitution were insubstantial. *Swift & Company v. Wickham*, 382 U. S. 111, 15 L. Ed. 194.

Thereafter, petitioners pursued their appeal which had been held in abeyance in the Court of Appeals for the Second Circuit. That Court rendered its decision on July 12, 1966, affirming the judgment of the District Court. The only two issues remaining before the Court of Appeals were those pertaining to preemption and conflict with the Poultry Products Inspection Act, 21 U. S. C. 451, 71 Stat. 441. The Court of Appeals found no basis for the claim that Congress had preempted the field of labeling of poultry products, although it expressly refused to rule that no preemption was intended in any part of the Poultry Products Inspection Act. The Court also found, with somewhat more difficulty, that there was not presented by the record in this case an irreconcilable conflict between New York and federal law.

Reasons for Granting the Writ

1. This case presents an issue which has never been determined in this court: viz., whether Congress, by providing for advance approval by the Secretary of Agriculture of labels on poultry products before they may be printed for use on such products, has precluded the states from regulating those selfsame labels. The Poultry Products Inspection Act prescribes a system of regulation of labeling different in nature than that incorporated in the Food, Drug and Cosmetic Act, 21 U. S. C. 301, 52 Stat. 1049. Under the latter statute, the text of labels of food products are subject to judicial review and that only after introduction of the food into interstate commerce and a challenge of the legality of its label by the Food and Drug Administration. Indeed, poultry products were subject to the Food, Drug and Cosmetic Act prior to the passage of the Poultry Products Inspection Act in 1958. It is of no little significance that Congress, in placing these products under the supervision of the Department of Agriculture, found it necessary and expedient to provide for advance approval by the Secretary of Agriculture before a label could be affixed to a poultry product processed under his supervision. It is reasonable to conclude from this change that Congress sought to invest the Secretary of Agriculture with complete control over the labeling of poultry products as distinguished from the more limited supervisory powers possessed by the Secretary of Health, Education & Welfare under the Food, Drug and Cosmetic Act. Here we have a product moving in interstate commerce bearing a label whose text had been approved by the Secretary of Agriculture before it was printed for use on

the poultry product and the action of the State of New York preventing the free movement of this product into that state. Furthermore, the Secretary of Agriculture has rejected for use on this same poultry product a label which would have satisfied the requirements of the State of New York. It follows, then, that the federal superintendence of the field which obviously was intended by Congress in passing this statute has been seriously impaired by the action of the State of New York, *McDermott* v. *Wisconsin*, 228 U. S. 115. In fact, the decisions below require the Secretary of Agriculture, in exercising his statutory authority to prescribe labeling on poultry products, to defer to the demands of the individual states, thereby effectively thwarting the manifest intention of Congress that the Secretary, in the field of labeling, be his own master.

2. The decision of the court below is of paramount importance in the administration of the Poultry Products Inspection Act. Since the Act was passed and put into operation, the Secretary of Agriculture has exercised his authority to grant prior approval of labels without concern for the possibility of contrary state labeling requirements. Moreover, the decision of the Court of Appeals vitally affects the enforcement of the Meat Inspection Act, 21 U. S. C. 71, 34 Stat. 1206, which is also administered by the Department of Agriculture. Under this latter statute, the Secretary has applied the procedures of prior approval, without challenge, since the Act first went into operation in 1907. The decision of the Court of Appeals requires the Secretary to alter his practices of long standing with respect to approvals of labels for poultry and meat products: wherever individual states have different or additional material which they wish to have appear on

a label, the Secretary must either defer to the states or, in the alternative, he must be prepared to conduct hearings on any label which his Administrator chooses to reject for reasons consistent with the administration of the statute but which, nevertheless, is required to satisfy the demands of one of the fifty states or political subdivisions thereof. Obviously, administrative chaos will result from such a situation. It is significant that no such hearings have been conducted in the nearly sixty-year history of the Meat Inspection Act or in the eight-year history of the Poultry Products Inspection Act. If the courts below were of the belief that such administrative difficulties would be avoided by cooperation between the federal and state agencies, the vanity of that belief is demonstrated by the fact that, despite the express urging of the Court of Appeals that "the administrative agencies involved in this controversy should seek to resolve this unsettled situation without delay" (R. 166a), absolutely no progress has been made in that direction since the opinion of the Court of Appeals was handed down on July 12, 1966. In Petitioners' application for an extension of time within which to file a petition for a writ of certiorari, counsel for Petitioners stated the following:

> "A series of meetings between representatives of the petitioners and officials of the United States Department of Agriculture have been conducted during this summer in an effort to resolve the problem which gave rise to this litigation in accordance with the suggestion contained in the last sentence of the Court of Appeals' opinion. We are advised that the Department of Agriculture expects to have formulated a proposal of discussion with the authorities of the State of New York within the next several weeks."

Counsel is presently advised that no meetings between the federal and state agencies are planned in the foreseeable future, no proposal of discussion has been formulated by the Department of Agriculture and no activity of any kind has been initiated by the State of New York.

The era of convenience foods is only in its infancy and combination food products containing meat or poultry as a principal ingredient, already numbered in the hundreds, are certain to proliferate even more as time goes on. The labeling of these products will become increasingly complicated. The scope of labeling problems in a system involving concomitant state and federal regulation would not be limited to weight statements but would cover the whole spectrum of possible label representations. E.g., see *Pacific Meat Co.* v. *Otagaski,* 394 P. 2d 918 (Hawaii, 1964). The ultimate disposition of this case will apply not only to stuffed turkeys but to hundreds, perhaps thousands, of other poultry products and meat products. Obviously the outcome of this litigation is of transcendent importance in the administration of both of these major federal programs.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. CONDON
WILLIAM J. COLAVITO
WILLIAM P. WOODS
19 West 44th Street
New York, New York 10036

ARTHUR C. O'MEARA
115 West Jackson Boulevard
Chicago, Illinois 60604

EARL G. SPIKER
711 14th Street, N.W.
Washington, D. C. 20005
Counsel for Petitioner
Swift & Company, Inc.

EDMOND L. JONES
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D. C. 20006
Counsel for Petitioner
Armour and Company